IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 61107-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
WARREN DONELL HAGLER,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: May 26, 2009
	)	

AGID, J.—Under chapter 10.99 RCW, certain crimes are designated by the prosecutor or the court as domestic violence crimes. It is neither necessary nor advisable to inform the jury that charges have been designated as domestic violence crimes under chapter 10.99 RCW. In this case, however, doing so was harmless. We affirm Warren Hagler's convictions, rejecting his remaining claims. But because the court imposed a sentence that exceeds the statutory maximum, we remand for the court to correct the sentence.

BACKGROUND

In 2005, Hagler was a 40 year old man without a stable place to live. He met Magen Hanrahan, a 19 year old cosmetology student. They quickly began an intimate relationship, and Hagler moved into Hanrahan's apartment within days.

Hanrahan was having trouble making her rent and car payments. Hagler gave her $1,300 to $1,500 in cash and gifts. Hanrahan understood the cash was in exchange for letting Hagler live in her apartment and drive her car.

Not long after the relationship began, the two argued in the car and Hagler assaulted Hanrahan. Hanrahan testified that Hagler punched her or hit her several times with a gun, pulled her across the center console by her hair, and told her she "owed him" and "was going to go and be a prostitute and give him back all of his money." Hagler held a gun to her temple and neck and told her he would kill her.

When they returned to Hanrahan's apartment, Hagler again told her she must become a prostitute to repay his money. Hanrahan had never been a prostitute before. Over the course of a few days, Hagler drove Hanrahan to several locations to engage in prostitution. He instructed her about what types of men to look for and how to find out if they were undercover police. He kept her car and the keys to her apartment, drove up and down the street to watch her, and called her cell phone repeatedly to see whether she had met anyone and how much money she had earned. He told her he would kill her if she went to the police.

The third time Hagler took Hanrahan to prostitute, she decided to get away. She explained her situation to the first man who propositioned her and paid him $50 to take her to the Space Needle, where she had a friend pick her up and take her to the police station. She cooperated with police to lure Hagler to a meeting, where they arrested him.

The State charged Hagler with assault in the second degree, promoting

prostitution in the first degree, unlawful possession of a firearm, and two counts of identity theft. On the charging documents, the State designated the assault charge and the promoting prostitution charge as domestic violence crimes.

Before trial, Hagler asked the court not to inform the jury of the domestic violence designations. The court denied the motion and read the charges as they appeared in the information, including the designation.

Hagler testified. He admitted he introduced the idea of prostitution as a solution to Hanrahan's money problems. He also acknowledged that he "smacked" Hanrahan and grabbed her by the hair in the car, but he denied using a gun. He explained she had "brung it on" herself by "disrespecting" him," and claimed that Hanrahan had "agreed to prostitute prior to me smacking her," and that he didn't smack her "to force her into prostitution." According to Hagler, "the assault was separate from me—her prostituting."

Hagler also admitted that he opened a bank account under a false name, deposited bad checks from that account into Hanrahan's Qualstar Credit Union account using a Boeing Employees Credit Union (BECU) automated teller machine, and then immediately withdrew $500 to take advantage of BECU's policy allowing members to access that amount before their checks clear. Using Hanrahan's debit card and personal identification number, Hagler was able to do this several times before the credit union blocked the account.

At the close of trial, Hagler objected to including the domestic violence designation in the instructions to the jury. The court overruled the objection, and the

designation appeared several times in the jury instructions and in three verdict forms.

The jury convicted Hagler of first degree promoting prostitution and two counts of identity theft, found him not guilty of unlawful possession of a firearm and second degree assault, and convicted him of the lesser included offense of assault in the fourth degree.

The court imposed the statutory maximum of 120 months for promoting prostitution and a concurrent, high end sentence of 57 months for identity theft. The court ordered the 120 month term to run consecutively to its 12 month sentence for the misdemeanor assault. Finally, the court imposed a 9 to 18 month term of community custody for each felony sentence.

DISCUSSION

Domestic Violence Designation

The domestic violence act, chapter 10.99 RCW, was designed to "recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse."[1] The legislature sought to correct "policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers."[2] Among other things, the legislature required that courts "identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence."[3] Pretrial no-contact

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[1] RCW 10.99.010.

[2] Id.

[3] RCW 10.99.040(1)(d). "Domestic violence" is defined by the statute to include a list of crimes "when committed by one family or household member against

orders are provided for, and such cases are to receive priority in scheduling.[4] The King County prosecutor designates domestic violence crimes on charging documents, presumably in part to assist the court in meeting these responsibilities.

The designation "does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced."[5] The designation need not be proven to a jury under Blakely.[6] Upon conviction of a domestic violence offense as defined by RCW 10.99.020, however, "sentencing courts are authorized to impose specialized no-contact orders, violation of which constitutes a separate crime."[7]

Hagler contends that informing the jury of the designation is prejudicial and unnecessary. The State responds it merely allows the jury to understand the exact charges. Whether and how to instruct a jury is a matter of discretion.[8]

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another." RCW 10.99.020(5).

[4] RCW 10.99.040(2).

[5] State v. O.P., 103 Wn. App. 889, 892, 13 P.3d 1111 (2000).

[6] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Winston, 135 Wn. App. 400, 406–10, 144 P.3d 363 (2006).

[7] State v. O'Connor, 119 Wn. App. 530, 547, 81 P.3d 161 (2003), aff'd, 155 Wn.2d 335 (2005).

[8] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (rulings on motions in limine reviewed for abuse discretion); State v. Kennard, 101 Wn. App. 533, 537, 6 P.3d 38 (a court has discretion in wording jury instructions), review denied, 142 Wn.2d 1011 (2000). A court abuses its discretion when its decision is unreasonable or based upon untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation, and we believe that prejudice might result in some cases.

Here, however, any error was harmless. Hagler conceded he was guilty of promoting prostitution in the second degree. The use or threat of force elevates promoting prostitution to the first degree, and Hagler contends the jury might have inferred from the domestic violence designation that he used force or threat to compel Hanrahan into prostitution. But there was no need for inference here; there was ample direct evidence of actual force and threats. Hanrahan testified that Hagler blackened her eye and threatened to "make it a lot worse," hit her several times about the head, held a gun to her head, and threatened to kill her if she went to the police. Hagler admitted he smacked Hanrahan and, while holding her by her hair, told her she was going to pay him back. The evidence of conduct constituting domestic violence within the general understanding of the term was thus undisputed.

Further, the domestic violence designation clearly did not influence the jury's consideration of the assault charge because it acquitted Hagler of assault in the second degree and unlawful possession of a firearm, and convicted him only of the lesser included offense of assault in the fourth degree, which he conceded.

An "'error is not prejudicial unless, within reasonable probabilities, the outcome

of the trial would have been materially affected had the error not occurred.'"[9] There is no reasonable probability of a different verdict here. Accordingly, any error was harmless.

Excessive Sentence

A sentence may not exceed the statutory maximum term set by the legislature.[10] The statutory maximum for promoting prostitution in the first degree is 120 months. The court imposed a sentence of 120 months plus 9 to 18 months' community custody on that count. The statutory maximum for identity theft in the second degree is 60 months. The court imposed a sentence of 57 months plus 9 to 18 months' community custody for the two identity theft convictions.

The State concedes that Hagler's term of confinement plus community custody exceeds the statutory maximum for these charges. It relies on State v. Sloan[11] for the proposition that the appropriate remedy is to remand for clarification that the term of confinement and community custody shall not exceed 120 months for promoting prostitution and 60 months for the two counts of identity theft.

Sloan has been called into question by our recent opinion in State v. Linerud.[12] That case held that "a sentence is indeterminate when it puts the burden on the [Department of Corrections] rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum."[13] Accordingly, "courts must limit

[9] State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).
[10] RCW 9.94A.505(5).
[11] 121 Wn. App. 220, 87 P.3d 1214 (2004).
[12] 147 Wn. App. 944, 197 P.3d 1224 (2008).
[13] Id. at 948.

the total sentence they impose to the statutory maximum. It is within the trial court's discretion to determine how much of that sentence is confinement and how much is community custody."[14]

We affirm Hagler's convictions and remand for resentencing in accord with Linerud. On remand the court should correct the apparent scrivener's error, through which the court recorded Hagler's offense score as 11 despite finding that it was 10.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

Offender Score

Through counsel and pro se, Hagler raises several issues concerning the calculation of his offender score. To arrive at an offender score of 10, the court included, among other things, four Nevada pandering convictions.[15] Hagler contends the court erred by including these because the State failed to prove they were his, and alternatively, they are not comparable to any Washington felony. We disagree.

The State has the burden to prove the existence and comparability of foreign convictions by a preponderance of the evidence.[16] Here, the State produced the Nevada judgment and sentences which bear Hagler's name. In the absence of sworn testimony to the contrary, this is sufficient proof the convictions belong to Hagler.[17]

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[14] Id. at 951.

[15] Though the court agreed with the State's offender score calculation of 10, it recorded the score as 11 on the judgment and sentence. We presume this was a scrivener's error that will be corrected on remand.

[16] State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

[17] State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

Further, Hagler's argument is undermined by his failure to protest the convictions before his sentencing hearing, despite logical opportunities to do so.[18] Sufficient evidence proves the pandering convictions belong to Hagler.

The State also proved the pandering convictions are comparable to the Washington crime of promoting prostitution in the second degree. In calculating an offender score, out-of-state convictions are classified "according to the comparable offense definitions and sentences provided by Washington law."[19] To do this, "'the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.'"[20]

Nevada's pandering statute provides: "A person who . . . [i]nduces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution . . . is guilty of pandering."[21] The trial court found that provision comparable to Washington's second degree promoting prostitution statute, which provides: "A person is guilty of promoting prostitution in the second degree if he knowingly: (a) [p]rofits from prostitution; or (b) [a]dvances prostitution."[22] In Washington, a person advances prostitution when, among other things, "he causes or aids a person to commit or engage in prostitution . . . or engages in any other

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[18] Hagler did not raise the issue in his pretrial motion to determine whether one of the Nevada convictions would count as a "strike" offense and did not raise it when the victim of one of the Nevada crimes attended a pretrial interview.

[19] RCW 9.94A.525(3).

[20] Ross, 152 Wn.2d at 230 (quoting State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999)).

[21] Nevada Revised Statutes (NRS) 201.300(1)(a).

[22] RCW 9A.88.080(1).

conduct designed to institute, aid, or facilitate an act or enterprise of prostitution."[23]

Hagler contends the two statutes are not comparable because, while the Washington offense must be committed "knowingly," the Nevada statute contains no mens rea. We disagree. It is implicit in the words "induces, persuades, encourages, inveigles, entices or compels" that pandering must be done knowingly. It cannot be done any other way.

Further, Nevada law provides that "[i]n every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence."[24] This overarching provision is inconsistent with a proposition that the absence of a specific mens rea in the statute creates a strict liability crime. Indeed, Nevada courts will not interpret statutes to create strict liability crimes unless "there is a clear legislative intent that the crime does not require any degree of *mens rea*."[25] Finding no such legislative intent,[26] we agree with the sentencing court that the pandering convictions are comparable and were properly included in Hagler's offender score.

Hagler next contends that three of his juvenile adjudications and one of his adult convictions should not have been counted in his offender score because they "washed" under RCW 9.94A.525. That statute provides that prior convictions for

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[23] RCW 9A.88.060(1).

[24] NRS 193.190.

[25] Zamarripa v. First Judicial Dist. Court, 103 Nev. 638, 642, 747 P.2d 1386 (1987).

[26] We are not persuaded that the presence of the word "knowingly" in related statutes is evidence that the Nevada legislature intended to make pandering a strict liability crime. See NRS 201.320(1), .340(1). The presence of "knowingly" in statutes that criminalize accepting money from the proceeds of prostitution and transporting someone with intent to pander that person falls short of "clear legislative intent" that pandering itself requires no degree of mens rea.

class C felonies are not included in the offender score if the offender has spent five consecutive, crime free years in the community after the last date of release from confinement.[27] Hagler asserts that he was crime free between 1996 and 2002. But that is not so. Although Hagler had no convictions in Washington during that period, he had multiple convictions in Nevada.[28] The court properly concluded the prior convictions did not wash.

Hagler also contends that the fourth degree assault conviction merges with the conviction for promoting prostitution in the first degree or that the two offenses encompass the same criminal conduct for sentencing purposes. The merger doctrine is a rule of statutory construction that applies only where the legislature has clearly indicated that in order to prove a particular degree of crime (here, promoting prostitution in the first degree), the State must prove not only that the defendant committed that crime (e.g., promoting prostitution), but also that the defendant committed an act that is defined as a crime elsewhere in the criminal statute.[29]

Hagler contends the State had to prove assault in the fourth degree to elevate the promoting prostitution to the first degree. That is not so. First degree promoting prostitution required the State to prove that Hagler knowingly advanced and/or profited from prostitution by compelling the victim by threat or force to engage in prostitution.[30] Hagler did not need to commit the assault in the car to be guilty of

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[27] RCW 9.94A.525(1)(c).

[28] These included convictions in 1998 for conspiracy to commit pandering and battery on an officer and convictions in 2000 for two counts of pandering, one count of pandering a child, and two counts of living from the earnings of a prostitute.

[29] State v. Vladovic, 99 Wn.2d 413, 420–21, 662 P.2d 853 (1983).

[30] RCW 9A.88.070(1).

promoting prostitution in the first degree; a different assault or threat of force is sufficient.

At trial, Hanrahan testified that Hagler threatened to make her eye worse after the assault in the car and that he threatened to kill her if she went to the police. She also testified that Hagler grabbed her hair so hard that some of it fell out. The assault in the car was a separate and distinct crime, proof of which was not necessary to elevate promoting prostitution to a higher degree. The convictions do not merge.

Neither do the convictions encompass the same criminal conduct under RCW 9.94A.589. That provision requires courts to count two or more current offenses as one if they require the same criminal intent, are committed at the same time and place, and involve the same victim.[31] If any one element is missing, the offenses do not encompass the same criminal conduct. Since Hagler used later threats and threatening behavior to force Hanrahan's prostitution, the promoting prostitution offense did not occur at the same time and place as the assault and is not the same criminal conduct.

Prosecutorial Misconduct

Hagler contends prosecutorial misconduct and vindictiveness deprived him of a fair trial. He cites the racist remarks of a deputy prosecutor who was fired before Hagler's trial, claims the State told a witness to lie, and falsely represented that the current charges were Hagler's third strike to persuade him to take a plea deal.

To prevail on a claim of prosecutorial misconduct, Hagler must show that the

[31] RCW 9.94A.589(1)(a).

prosecutor's conduct was both improper and prejudicial.[32] Hagler establishes neither.

First, there is no evidence that the prosecutors representing the State at trial had anything to do with the prosecutor who made racist remarks, or that they otherwise engaged in misconduct. We do not impute the misconduct of one prosecutor to the entire prosecutor's office. Further, Hagler does not suggest any prejudice beyond the fact that he was prosecuted.

There is also no evidence to support Hagler's assertion that witness Erin Riley gave false testimony, much less that she was encouraged by the State to do so. Even if the State told Riley to lie, Hagler can show no prejudice because Riley did not testify at trial.

Finally, Hagler did not accept a plea deal. Whatever representations the State made in negotiations clearly caused no prejudice.

Failure to Strike Testimony

When the State attempted to cross-examine Hagler, he loudly and repeatedly informed the jury that "[t]he King County Prosecutor's Office called me a nigger." Hagler waived a copy of a newspaper article detailing the incident, which had resulted in the firing of the deputy prosecutor. After warning Hagler outside the jury's presence, the court gave him another opportunity to answer the State's questions. Hagler continued his diatribe. The court summarily found him guilty of two counts of contempt and sanctioned him with two, consecutive, 30 day terms in jail. After Hagler indicated again that he would not refrain from commenting on the matter, the court

[32] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004).

instructed the jury to disregard the comments and that it was free to consider Hagler's refusal to be

cross-examined in evaluating his credibility as a witness.

Hagler contends the court's response to his refusal to answer the State's questions was an abuse of discretion. We disagree. A trial court has discretion to fashion an appropriate sanction when a witness refuses to submit to cross examination, including instructing the jury that the failure to answer a proper question should be considered in determining the witness's credibility.[33] There was no error.

We affirm, but remand for the trial court to correct Hagler's sentence in accordance with Linerud. The new judgment and sentence should also reflect the correct offender score.

Ajid, J.

WE CONCUR:

Grosse, J

[33] State v. Olson, 30 Wn. App. 298, 301–02, 633 P.2d 927 (1981).